

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Charter Communications VIII Operating, LLC	)	
d/b/a Charter Communications	)	
	)	CSR-5933-E
Petition for Determination of Effective	)	
Competition in Marshall, MN (MN0001)	)	
	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: September 5, 2002**

**Released: September 6, 2002**

By the Deputy Chief, Media Bureau:

**I. INTRODUCTION**

1. Charter Communications VIII Operating, LLC d/b/a Charter Communications (“Charter”) has filed with the Commission a petition alleging that Charter is subject to effective competition from competing service providers in the City of Marshall, Minnesota (“Marshall”). Charter alleges that its cable system serving Marshall is subject to effective competition, pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended (“Communications Act”),<sup>1</sup> and Sections 76.7(a)(1) and 76.905(b)(2) of the Commission’s rules, and seeks revocation of the certification of the local franchising authority in Marshall to regulate basic service rates.<sup>2</sup> Charter bases its allegation of effective competition on the competing services provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and EchoStar Communications Corporation (“EchoStar”), and an overbuilder, McLeod USA. No opposition to the petition was filed.

**II. DISCUSSION**

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>3</sup> as that term is defined by Section 76.905 of the Commission’s rules.<sup>4</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. Based on the record

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<sup>1</sup>47 U.S.C. § 543.

<sup>2</sup>47 C.F.R. § 76.905(b)(2).

<sup>3</sup>47 C.F.R. § 76.906.

<sup>4</sup>47 C.F.R. § 76.905.

in this proceeding, Charter has met this burden.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.<sup>5</sup>

4. Turning to the first prong of this test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.<sup>6</sup> Charter has provided evidence of the advertising of DBS service in news media serving Marshall.<sup>7</sup> We find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer more than 12 channels of video programming, including more than one non-broadcast channel.<sup>8</sup> Charter has demonstrated that Marshall is served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Charter has also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in Marshall, that there exists no regulatory, technical, or other impediments to households within Marshall taking the services of the DBS providers, and that potential subscribers in Marshall have been made reasonably aware of the MVPD services of DirecTV and EchoStar.<sup>9</sup> Therefore, the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Charter has obtained subscriber numbers from McLeod USA ("McLeod"), a cable overbuilder operating in Marshall.<sup>10</sup> Charter asserts that it is the largest MVPD in Marshall because Charter's own subscribership exceeds that of McLeod.<sup>11</sup> Based upon McLeod's 36.7 percent subscriber penetration level, calculated using 2000 Census household data,<sup>12</sup> we find that Charter has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in Marshall. Therefore, the second prong of the competing

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<sup>5</sup> 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>6</sup> *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

<sup>7</sup> Petition at 3 and Exhibit 1.

<sup>8</sup> *See* 47 C.F.R. § 76.905(g). *See also* Petition at 4 and Exhibits 2-3. Exhibit 2 includes the channel lineup for Charter's cable system serving Marshall and Exhibit 3 contains the nationwide channel lineups of DirecTV and EchoStar.

<sup>9</sup> Petition at 2-4.

<sup>10</sup> Petition at 5 and Exhibit 6.

<sup>11</sup> *Id.* at 5 and Exhibit 5. Charter does not provide evidence demonstrating that its subscribership exceeds that of the DBS providers. However, assuming that one of the DBS providers was the largest MVPD in Marshall, Charter's own subscribership penetration (3,848 Charter subscribers ÷ 4,914 Marshall 2000 Census households = 78.3%) or that of McLeod (1,805 McLeod subscribers ÷ 4,914 Marshall 2000 Census households = 36.7%) would exceed the 15 percent level required for a finding of effective competition. *Id.* at Exhibits 4, 5.

<sup>12</sup> *See id.* at Exhibit 4.

provider test is satisfied. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable system serving Marshall is subject to effective competition.

### III. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Charter Communications VIII Operating, LLC d/b/a Charter Communications **IS GRANTED**.

7. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service in the City of Marshall, Minnesota **IS REVOKED**.

8. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>13</sup>

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief, Media Bureau

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<sup>13</sup>47 C.F.R. §0.283.